plaintiff to call for payment appears in paragraph 1 of page 1 as follows:—

"WE HEREBY JOINTLY AND SEVERALLY GUARANTEE to you the repayment on demand in writing being made to us/me by you or any of your duly authorised officers of all moneys advanced to or paid for or on account of the Principal Debtor whether before or after the date hereof and interest thereon remaining unpaid or which shall at any time hereafter be owing or payable to you on any account whatsoever by the Principal Debtor, including all interest charges for commission and other usual Bankers' charges."

This is a liquidated claim by the plaintiff and the 1st defendant is not alleging that the contract between himself and the plaintiff is unenforceable and if the application is allowed it only serves to delay repayment by the 1st defendant. But the 1st defendant may on the other hand be condemned to costs and the interest will run all the same. Thus I can only interpret the 1st defendant's application as merely an attempt to delay repayment.

In the circumstances, I dismiss the 1st defendant's application with costs.

Application dismissed.

Solicitors: *Yusof & Co.; Wrigglesworth & Co.*

CHE SU BINTI DAUD v. PUBLIC PROSECUTOR

[O.Cr.J. (Gunn Chit Tuan J.) March 14, 1978]

[Penang — Criminal Application No. 6 of 1978]

Criminal Law and Procedure — Bail — Application for — Dangerous drugs — Accused, mother of 5 children, charged for trafficking in dangerous drugs — Accused with 4-month old baby who needed breastfeeding in prison — Factors for consideration in granting or refusing bail — Criminal Procedure Code (F.M.S. Cap. 6), ss. 388 & 389 — Dangerous Drugs Ordinance 1952, s. 39(B)(1)(a).

Dangerous Drugs — Bail — Application for — Factors for consideration in granting or refusing bail — Criminal Procedure Code (F.M.S. Cap. 6), ss. 388 & 389 — Dangerous Drugs Ordinance, 1952, s. 39(B)(1)(a).

The accused was charged together with her husband and her brother for trafficking in dangerous drugs under section 39(B)(1)(a) of the Dangerous Drugs Ordinance, 1952. Her application for bail was refused by the Special Sessions Court. The offence with which the accused had been charged was punishable with death or imprisonment for life. The accused was a mother of six children, aged 11, 9, 6, 4, 3 years and 4 months old respectively. Her 4-month old baby had to be with her in prison as she was still breastfeeding the child. Her trial was not to be heard yet for another three months and could possibly, be even later.

Held, allowing bail: (1) though a Judge has under sections 388 and 389 of the Criminal Procedure Code absolute discretion in granting bail, that discretion must be exercised judicially and he should not (save for exceptional and very special reasons) grant bail if there appears reasonable grounds for believing that the accused had been guilty of an offence punishable with death or life imprisonment;

(2) in the circumstances of this case the accused should be admitted to bail.

Cases referred to:-

(1) *Re K.S. Menon* [1946] M.L.J. 49.

(2) *R.* v. *Ooi Ah Kow* [1952] M.L.J. 95.

(3) *Public Prosecutor* v. *Latchemy* [1967] 2 M.L.J. 79.

(4) *Public Prosecutor* v. *Wee Swee Siang* [1948] M.L.J. 114.

(5) *Keshav Vasudeo Kortikar* v. *Emperor* A.I.R. 1933 Bom. 492.

CRIMINAL APPLICATION.

C.V. Prabhakaran for the applicant.

Haidar bin Mohamed Noor (Deputy Public Prosecutor) for the respondent.

Gunn Chit Tuan J.: The accused/applicant was charged together with her husband Salien bin Saud and her brother Ismail bin Daud in the Sessions Court in Butterworth on March 5, 1978, for an alleged offence of trafficking in dangerous drugs under section 39(B)(1)(a) of the Dangerous Drugs Ordinance, 1952 (F.M. No. 30 of 1952). The case was transferred to the Special Sessions Court in George Town and when she appeared before the President of the Special Sessions Court, George Town, on March 6, 1978 her application for bail was refused, but she was apparently advised by the learned President to apply to the High Court for bail.

Though a judge has under sections 388 and 389 of the Criminal Procedure Code (F.M.S. Cap. 6) absolute discretion in granting bail, that discretion must be exercised judicially and he should not (except for exceptional and very special reasons) grant bail if there appears reasonable grounds for believing that the accused has been guilty of an offence punishable with death or life imprisonment. (See *Re K.S. Menon*(1) and *Regina* v. *Ooi Ah Kow*(2)). The offence with which the accused/applicant has been charged is punishable on conviction under section 39(B)(2) of the Dangerous Drugs Ordinance, 1952, with death or imprisonment for life and also, if the offender is not sentenced to death, with whipping. It was therefore necessary for me to consider some of the facts before me in order to find out whether there were any exceptional or very special reasons in the present case for bail to be granted. What constitutes exceptional and special reasons must necessarily depend on the facts of each case. I was, of course, aware that I should not make any statements which were likely to, or probably be construed as indicating my views of the case, though I was at a disadvantage in considering this application when there was little of the evidence before me which it was intended to adduce at the trial.

However, according to the affidavit filed in support of the application, the accused/applicant has affirmed that she was in her bedroom feeding her 4-month old baby on the day and time in question when she was arrested. She was not aware that there were any drugs in her house at that time, and although the incriminating articles were found in her house, they were not in her possession. She has 6 children who are 11 years, 9 years, 6 years, 4 years, 3 years and 4 months old respectively. Since her arrest all her children, except the youngest one, have been in the care of their grandparents who are old and unable to give them proper attention. She herself was in poor health and her youngest child has been staying with her in the prison where conditions were such as not to be conducive to the child's health as well as to her health as she was not able to get special food for both of them. Her 4-month old baby has to be with her in prison as she was still breast-feeding the

child. Her other children would also suffer mentally and physically during her absence in prison. It would be quite some time before her case could be heard and disposed of and in the meantime she was not able to give proper instructions to her solicitor.

There was no affidavit filed in reply by the learned Deputy Public Prosecutor, who opposed bail and referred to *Public Prosecutor* v. *Latchemy*[3] in which case the only ground for application for bail was that the accused was "a mother of 10 children and the youngest of them is still under breast-feed". On an appeal from the Magistrate's Court which had granted her bail, Pawan Ahmad J. held that the reasons put forward in that application fell short of being exceptional and very special reasons and that the application should have been refused. Bail was cancelled and the accused was ordered to be put back on remand. With respect, I agree that the fact that an accused was breast-feeding a child was not an exceptional or very special reason for granting bail, but in my opinion that case is distinguishable from the present one in that the accused/applicant here was not charged alone but has been charged jointly with her husband and her brother. In *Latchemy's* case she was charged for murder which was punishable with death only, whereas in the present case the offence is punishable with death or imprisonment for life. Moreover, other matters, to which I shall refer later on, had to be considered in deciding whether bail should be refused or granted in this case.

The matters for consideration in granting or refusing bail are set out in *Mallal's* Criminal Procedure (4th Edition) at page 551 and they are as follows: —

(1) the nature and gravity of the offence charged;
(2) the nature of the evidence in support of the charge;
(3) whether there was or was not reasonable ground for believing the accused guilty of the offence;
(4) the severity and degree of punishment which conviction might entail;
(5) the guarantee that the accused, if released on bail, will not either abscond or obstruct the prosecution in any way;
(6) the danger of the offence being continued or repeated;
(7) the danger of the witnesses being tampered with;
(8) whether the accused, if released on bail, is likely to tamper with the prosecution evidence;
(9) whether the accused is likely to get up false evidence in support of the defence;
(10) the opportunity of the accused to prepare the defence;
(11) the character, means and standing of the accused;
(12) the long period of detention of the accused and probability of further period of delay.

The above points which a court may take into consideration when granting or refusing bail were quoted with approval by Callow J. in the case of *Public Prosecutor* v. *Wee Swee Siang.*[4] These points do not appear to form an exhaustive list and there may be many other points too. The legislature has, for instance, by the proviso to section 388(i) of the Criminal Procedure Code made extreme youth or sex or state of health of the accused matters for consideration in the exercise of the court's discretion. It is the net result of all the considerations for and against the accused which must ultimately decide the matter.

In this case it could not be denied that the accused/applicant had been charged with a serious offence which is punishable on conviction with death or imprisonment for life. But apart from stating that the fact that the accused/applicant has been charged showed that there was sufficient evidence against her, the learned Deputy Public Prosecutor was reluctant or unable to inform the court of the nature of the evidence in support of the charge and considered that it was not right for the prosecution to disclose any evidence to the court at that stage. I realised that at an early stage it was not possible to have evidence from the prosecution to establish the guilt of the accused beyond reasonable doubt. (See *Keshav Vasudeo Kortikar* v. *Emperor.*[5] But since the application for bail has been made at an early stage the prosecution should satisfy the court that it would be able to produce good *prima facie* evidence in support of the charge. Be that as it may, I also enquired from the learned Deputy about the other matters which ought to be considered in deciding whether bail should be granted or refused. It was understandable that the learned Deputy was unable to say whether the accused/applicant would abscond when released on bail. But, in my opinion, I did not think that there would be any danger of this offence being repeated or that the accused would tamper with the prosecution's evidence if she was released. Her trial is not to be heard yet for another three months and there again it was conceded by the prosecution that there was no guarantee that the case would definitely be proceeded with during June this year. I agreed with learned counsel for the accused/applicant that if she was released she would have the opportunity to prepare her defence. Having weighed all the above considerations and having given them their proper weight, I was of the view that the accused/applicant in this case should be released on bail. This should not be taken to suggest for a moment that I was prejudging the case against the accused/applicant. As I have stated above, I had little evidence before me which was intended to be adduced at the trial and her guilt or innocence was therefore a matter for future determination by the trial court. In a matter like the present one, whether release on bail be refused or allowed, there should be no ground to suggest that the case has been pre-judged. The only case in which such an assumption could possibly be justified was where the accused/applicant has satisfied the court that on the evidence already produced there was no possible case against her and such was not the case here.

In the circumstances of this case, I therefore directed that the accused/applicant be admitted to bail of $5,000 with two sureties acceptable to the learned Senior Assistant Registrar.

Bail allowed.

Solicitors: *C.V. Prabhakaran & Co.*